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JUDICIAL AND REGULATORY DECISIONS

Department Editor: Allen H. Meyer*

PRIMARY JURISDICTION OF THE CIVIL AERONAUTICS BOARD IN ANTI-TRUST CASES

IN the enactment of the Civil Aeronautics Act, Congress, in setting out to delegate the maintenance of general economic controls, ventured into the field of trade regulation.¹ Treating aeronautics as a "regulated industry" the Act takes the position that certain enumerated trade practices are unlawful, unless and until approval by the CAB is secured.² Among the specific practices to which the Act is directed are consolidations, mergers among carriers and acquisitions of control of other carriers (Section 408);³ interlocking relationships (Section 409);⁴ loans and financial aid (Section 410).⁵ Section 411 authorizes the Board to issue a cease and desist order if it finds that a carrier is engaged in "unfair methods of competition";⁶ Section 412 requires approval by the Board of all pooling and other agreements between carriers;⁷ and Section 414 relieves any person affected by orders under Section 408, 409, or 412 from the operation of anti-trust laws.⁸

The extent to which the procedures and remedies set forth in the Act are conclusive of the role of CAB control over monopolies and conspiracies in restraint of trade in the air field has been brought to light in *S.S.W. Inc. v. Air Transport Ass'n of America, et al.*⁹ Alleging violations of the Sherman¹⁰ and Clayton¹¹ Acts, plaintiff, a non-scheduled¹² air carrier, charged such practices¹³ as would appear to take the case out of the framework of the trade regulation provisions of the Civil Aeronautics Act, and prayed for relief in the form of an injunction and treble damages, the former being a rem-

*Student Editor, Legal Publications Board Northwestern University School of Law.

¹ 52 Stat. 977 (1938), as amended, 49 U.S.C. 401 et seq. (Supp. 1951).

² §401 of the Act, 52 Stat. 980 (1938), 49 U.S.C. §402 (Supp. 1951). In addition, statements of the legislative intent to regulate the air transport industry may be found in 83 Cong. Rec. 6507, 6628, 6728-6732 (May 9-16, 1938).

³ 52 Stat. 1001 (1938), 49 U.S.C. §488 (Supp. 1951).

⁴ 52 Stat. 1002 (1938), 49 U.S.C. §489 (Supp. 1951).

⁵ 52 Stat. 1003 (1938), 49 U.S.C. §490 (Supp. 1951).

⁶ 52 Stat. 1003 (1938), 49 U.S.C. §491 (Supp. 1951).

⁷ 52 Stat. 1004 (1938), 49 U.S.C. §492 (Supp. 1951).

⁸ 52 Stat. 1004 (1938), 49 U.S.C. §494 (Supp. 1951).

⁹ 91 F. Supp. 269 (D.C.D.C. 1950). Presently on appeal to the Circuit Court (civil action No. 1332-49). Upon petition to intervene, the Circuit Court ordered consolidation with *Air Transport Associates Inc. and Golden North Airways v. Air Transport Association of America, et al.*, which alleges substantially the same charges against the same defendants. A similar case is now pending in the New Jersey District Court, *Slick Airways Inc. v. Air Transport Association of America* (civil action No. 317-50), alleging substantially similar unfair and monopolistic practices against virtually the same party-defendants and praying for treble damage relief.

¹⁰ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§1-7 (1946).

¹¹ 38 Stat. 730 (1914), 15 U.S.C. §§12-27 (1946).

¹² It is worthy of note that the bulk of litigation alleging unfair trade practices in the air industry has been initiated by the scheduled carriers against the non-scheduled. Of course, these cases have been directed at predatory practices, rather than the monopolistic and restraint of trade practices alleged in the instant case.

¹³ To take the allegations out of the specific language of §§411 and 412, if such sections are to be construed strictly as inclusive of only those practices set forth in express terms, the plaintiffs charged combinations and conspiracies to: hinder and prevent it from attaining sources of numerous ticket agencies; to discredit it and disparage it in the eyes of the public; by use of false and

edy available under Sections 411 and 412, if resort is had to the Board, but the latter being a remedy wholly without the scope of the Civil Aeronautics Act. Defendant's motion to dismiss rested on the grounds that the complaint raised administrative problems peculiar to the agency regulating the industry, and as such, was subject to the primary jurisdiction of the Board under Section 412. In the face of plaintiff's contention that the primary jurisdiction doctrine should not apply where the agency has no authority to enjoin the illegal practices charged or to award the damages prayed for, the district court dismissed on the dual grounds of administrative expedience and the authority of a comparable case arising under the industry regulated by the Shipping Board.¹⁴ The main question raised by the *S.S.W.* holding is whether any of the above provisions, taken separately or collectively, requires the conclusion that the Board has primary jurisdiction in cases in which a conspiracy in restraint of trade, allegedly not within the framework or content of the prohibited practices, is charged. Stated another way, if the CAB is to have primary jurisdiction, the query is as to whether or not it follows necessarily, in the alternative, that there is to be exclusive jurisdiction in the Board which would serve to bar an anti-trust suit, or that there must be an exhaustion of administrative remedies, or that the cause should be held in abeyance until the Board determines complicated questions of fact. The *S.S.W.* court speaks in terms of neither primary nor exclusive jurisdiction, but arrives at a result indicative of either.¹⁵ Resolution of this ambiguity necessitates an inquiry into what the Congress and the courts have intended by the use of such phraseology.

The history of the "primary jurisdiction" doctrine, based on judicial reluctance to intervene prematurely in administrative proceedings, as distinguished from the statutory prohibition under the "exclusive jurisdiction" doctrine, would seem to rest on its initial application by the Supreme Court in the *Abilene*¹⁶ case. Here the court held that there could be no action to recover alleged over-payments of railroad rates until the ICC had first passed on the reasonableness of the rates. Extension of the doctrine in the field of

misleading statements; to eliminate and prevent competition for air carrier passenger and freight transportation; to offer transportation at cut prices until competition is eliminated; to obtain from gasoline and oil suppliers large quantity discounts not available to plaintiff; and to cause refusal and delay to it of vital maintenance and other services at airports.

¹⁴ *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932). The *S.S.W.* court states that the *Cunard* case is "completely dispositive of the case" before it, despite the fact that the *Cunard* court talks in terms of both the primary and exclusive jurisdiction doctrines.

¹⁵ Differentiation between primary and exclusive jurisdiction has resulted in much confusion, the reason being that the cases appear to use the terms interchangeably. The earlier non-antitrust cases usually spoke in terms of preliminary or initial jurisdiction. In the *Cunard* case (see notes 14 *supra*, and 38 *infra*) the court uses the phrase "exclusive primary." A strict reading of the *S.S.W.* opinion, in its acceptance of the *Cunard* case and its rejection of the contention that the case should be held in abeyance rather than dismissed, would lend weight to an argument that, having accepted "exclusive primary," but rejected a form of "primary," the role of the CAB is exclusive jurisdiction, a result not necessarily consistent with the Act itself.

The plaintiff in the *S.S.W.* case, relying on *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940), argued that even if there were primary jurisdiction in the Board, the litigation should not be dismissed but that the court should merely have stayed its hand, and the cause held in abeyance, pending the conclusion of an appropriate administrative proceeding. The court granted the motion to dismiss, citing *Armour & Co. v. Alton Ry.*, 312 U.S. 195 (1940), where the case was dismissed because there were complex transportation problems which first had to be determined by the Board, and held the *El Dorado* case inapplicable because there the primary jurisdiction point was not raised until after a decision on the merits.

¹⁶ *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

railway transport is found in instances where the ICC was required to pass on whether a particular practice of routing was reasonable;¹⁷ whether continuance of service on an industrial track without a certificate was discriminatory;¹⁸ whether intra-state rates were discriminatory against inter-state commerce;¹⁹ and whether an existing allotment of freight cars was discriminatory.²⁰ On the other hand, the court refused to invoke the doctrine where the only question was one of construction of a tariff,²¹ or otherwise a question of law.²²

In the field of air transport, primary jurisdiction has been invoked and adhered to quite rigorously. In *Trans-Pacific Airlines v. Hawaiian Airlines*²³ where the plaintiff, a scheduled airline, sought an injunction against a non-scheduled airline, alleging that its operation without a certificate rendered it guilty of unfair methods of competition, the 9th Circuit has ruled that the district court should have held the cause in abeyance until the Board made a preliminary determination.²⁴ The language in *American Airlines v. Standard Airlines*,²⁵ based on similar facts, is somewhat more ambiguous. Here the court held jurisdiction to determine whether a letter of registration, exempting defendants from the requirement of a certificate, was still in effect is "at least initially with the Board." In *Adler v. Chicago & Southern Airlines*,²⁶ the court dismissed an action for breach of contract for cancellation of a flight, because there had been no allegation that the CAB has passed on the reasonableness of the cancellation, leaving open the question of what result would ensue had the Board acted on the reasonableness.²⁷

¹⁷ Northern Pacific Ry. Solum, 247 U.S. 477 (1918).

¹⁸ Texas & Pacific Ry. Co. v. Gulf, Coronado, & Santa Fe Ry., 270 U.S. 266 (1926).

¹⁹ Board of R. R. Comm'rs v. Great Northern Ry., 281 U.S. 412 (1930).

²⁰ Baltimore & Ohio Ry. v. U.S., ex rel. Pitcairn Coal Co., 215 U.S. 481 (1910).

²¹ Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285, 291 (1921). Here the court held that the answer depended upon "the character of the controverted question and the nature of the enquiry necessary for its solution," and concluded that the doctrine should not apply where there is involved only a pure question of law.

²² Illinois Central Ry. v. Mulberry Hill Coal Co., 238 U.S. 275 (1915). (The allegation was a violation of a statute requiring a railroad to furnish cars within a reasonable time); Pennsylvania Ry. v. International Coal Mining Co., 230 U.S. 184, 196 (1913). (Question was the unlawfulness of a departure from published rates); Louisville and Nashville Ry. Co. v. F. W. Cook Brewing Co., 223 U.S. 70, 84 (1911). (Question was the duty of carriers to transport intoxicating liquors.)

²³ 174 F. 2d 63 (9th Cir. 1949).

²⁴ This case overturned the lower court holding in *Hawaiian Airlines v. Trans-Pacific Airlines*, 78 F. Supp. 1 (D. Hawaii 1948) in which the defense of primary jurisdiction was rejected. The argument of primary jurisdiction was also rejected in a recent suit by the Government for injunction under the Sherman Act, *United States v. Inter-Island Steam Navigation Co., et al.*, 87 F. Supp. 1010 (D. Hawaii 1950), but the lack of jurisdiction of the Board rested on the fact that the acquisition of control was accomplished prior to the effective date of the Civil Aeronautics Act.

²⁵ 80 F. Supp. 135 (S.D.N.Y. 1948).

²⁶ 41 F. Supp. 366 (E.D. Mo. 1941).

²⁷ The holding of this case was severely criticized in *Schwartzman v. United Airlines*, 6 F.R.D. 517 (D.C. Neb. 1947), where the allegations were substantially the same. Perhaps dismissal in the Adler case was based on the defective complaint. The opinion is not clear on this point.

The Adler case has been distinguished as a case involving reasonableness in *Pacific Northern Airlines v. Alaska Airlines*, 80 F. Supp. 592 (D.C. Alaska 1948). Here the allegation was that the defendant was engaging in too many flights to be considered an irregular carrier, and an injunction was sought to enjoin the defendant from operating without a certificate. In taking jurisdiction, the distinction drawn by the court was that this case involved a violation of a lawful provision of the Civil Aeronautics Act, and not the reasonableness of a provision.

Apparent from the language of the courts is a judicial approach evidencing a desire that the administrative agency, ostensibly the more particularly adapted by virtue of its expert knowledge, personnel, procedure, and experience, not the courts, should execute the function of dealing with the complexities delegated to it.²⁸ It is worthy of note, however, that although the courts speak in terms of primary or initial jurisdiction in the agency, there is no indication that the jurisdiction is exclusive. Nor is there any language, even in the *Adler* case where the word "dismiss" is used,²⁹ to the effect that once the agency determines the facts in favor of the complainant, he could not then maintain a suit, nor that he cannot secure the relief he seeks. In the *S.S.W.* case, the court, in dismissing the argument that there is jurisdiction in addition to or beyond that of the Board, relied upon a comparable anti-trust case under the Shipping Board, which in turn had relied on a case arising under the jurisdiction of the ICC.

The first anti-trust cases in which the Supreme Court appears to have applied the primary jurisdiction doctrine in regulated industries were those arising under the ICC.³⁰ In *Keogh v. Chicago & North Western Ry.*,³¹ a treble damage suit under the Sherman Act, plaintiff shipper alleged a conspiracy between the carrier and the other shippers to eliminate competition by charging arbitrary and unreasonable rates, higher than those likely to be charged if competition had been maintained. Although cited for the doctrine,³² the effect of the court's decision on the primary jurisdiction issue is not clear. The court, holding that mere extraction of a higher rate than would have otherwise prevailed was not a violation of the plaintiff's legal rights, inasmuch as the Commission had already approved the rate, merely pointed out that even if the rate had not been approved, a treble damage action could not be maintained because recovery would result in an unfair advantage to the plaintiff; that the only remedy in rate cases was before the Commission, to recover the excess paid. Such finding of a full and adequate remedy under the ICC Act would serve to further the argument that the remedy available is exclusive, rather than primary. In *Terminal Warehouse v. Pennsylvania Ry.*,³³ on a similar allegation of conspiracy, the court held that discriminatory privileges and payments, without more, would not make out a combination in restraint of trade within the Sherman Act, repeating the theme that the sufferer of discriminatory rates has a remedy in damages before the ICC. However, the court went on to say that, in holding that a sufferer from discriminatory rates must in the first instance resort to the Commission, it did not intimate that a common carrier could never, by discriminatory rate agreements, be deemed a party to a conspiracy in restraint of trade with resultant liability. On the contrary, the court stated that resort to the Commission would not be necessary if there was alleged a conspir-

²⁸ For another treatment of the origin and reasons behind the "primary jurisdiction" doctrine, see Note 51 HARV. L. REV. 1251 (1938).

²⁹ See Note 27 *supra*.

³⁰ The argument of primary jurisdiction in other regulated industries has been rejected in *United States v. United States Alkali Export Assn.*, 58 F. Supp. 785, 787 (S.D.N.Y. 1945), affirmed 325 U.S. 196 (1945), (FTC may investigate violations of the Sherman Act, notwithstanding exemptions under the Webb-Pomerene Act); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (the Petroleum Administrative Board may not authorize price-fixing violative of the Sherman Act); *American Tobacco Co. v. United States*, 147 F. 2d 93 (6th Cir. 1944), affirmed 328 U.S. 781 (1946), (rejected the sanction by the Department of Agriculture).

³¹ 260 U.S. 156 (1922).

³² The *Keogh* case was cited in the *Cunard* case for the proposition that the doctrine did apply to anti-trust cases.

³³ 297 U.S. 500 (1936).

acy to monopolize to the destruction of the plaintiffs.³⁴ Insofar as the *Keogh* and *Terminal Warehouse* cases are unfair trade practice actions by shippers against carriers, it might be argued that such cases are not conclusive of actions in which the parties are carriers exclusively, as in the *S.S.W.* case. It is not surprising, however, that in the railroad field, no cases may be found³⁵ in which carriers attempt to invoke the courts against other carriers. The element of non-scheduled operations in the air field, lends itself more readily to the higher incidence of unfair intra-industry competition activities than are to be found among railway carriers. A further authority not to be overlooked in this area is the effect of the holding of *Georgia v. Pennsylvania Ry. Co., et al.*³⁶ Faced with the question as to whether State could sue for treble damages and an injunction against an alleged conspiracy to establish a discriminatory rate system, the court held first that, on the basis of the *Keogh* case, there is no action for damages for the charging of specific rates previously approved by the ICC. On the injunction question, the court held that even though the carriers were subject to the regulation of the ICC, the conspiracy alleged was within the proper jurisdiction of the courts in the first instance. Plaintiffs in the *S.S.W.* case relied on the dicta in the *Georgia* case to the effect that the aspect of conspiracy is sufficient standing alone to bring the charges within the Sherman Act. On the other hand, the defendants argued that the primary jurisdiction doctrine, as approached in the *Georgia* case, would be inapplicable only if the administrative agency was completely lacking in power to deal with the subject of the action, and that Sections 411 and 412 were adequate to indicate control by the Board over the activities.

The *Keogh* case was the main authority relied upon by the Supreme Court when it came to grips with the primary jurisdiction question under the Shipping Act.³⁷ In *United States Navigation Company v. Cunard*,³⁸ the only case in point cited in the *S.S.W.* opinion, the court was dealing with a combination and conspiracy to restrain trade in the carriage of general cargo, allegedly outside the scope of the jurisdiction of the Shipping Board. Unlike the instant case, the prayer sought only injunctive relief, without any attempt to gain damages. In dismissing the suit, however, the *Cunard* court stated in ambiguous terms that the matter fell "within the *exclusive primary* jurisdiction of the Shipping Board."³⁹ (Emphasis added.) The *S.S.W.* court, however, did not go so far as to use words of "exclusiveness" but deemed the jurisdiction to be "primary." Even though it is difficult to ascertain whether courts rely more heavily on a natural self-indulgence not to interfere with administrative action in regulated industries, or on the statutory provisions of that particular legislation, in order to reconcile or distinguish these holdings, it is necessary to analyze the organic legislation upon which the courts seem to be operating.

Although the language of Section 412 of the Civil Aeronautics Act is sub-

³⁴ Cf. *Meeker v. Lehigh Valley Ry.*, 183 Fed. 549 (2nd Cir. 1910). Although not cited in the *Terminal Warehouse* case, the holding here was that where the allegation was a conspiracy to monopolize interstate trade in anthracite coal by increasing freight charges to the point of driving the complainant out of business, there was a cause of action under the Sherman Act separate and distinct from the Interstate Commerce Act, even though there was involved an increase of freight rates, the reasonableness of which had to be passed on by the ICC.

³⁵ Cf. *Texas & Pacific Ry. Co.* case, note 18, *supra*. The allegation here was only that an extra industrial tract was being maintained without a certificate. This falls short of serving an injunction against a railroad to prevent it from operating.

³⁶ 324 U.S. 439 (1945).

³⁷ §15, 39 Stat. 733 (1916), 46 U.S.C. §814 (1946).

³⁸ 284 U.S. 474 (1932).

³⁹ 284 U.S. 474, 485 (1932).

stantially the same as that of Section 15 of the Shipping Act,⁴⁰ which was held the basis for the Board's jurisdiction over anti-trust cases in the *Cunard* case, and to Section 5 of the Interstate Commerce Act,⁴¹ there are three major points of distinction. First, the CAB, unlike the Shipping Board and the ICC,⁴² has no power to award damages of any sort.⁴³ This fact stands as contradictory to the conclusion at which the *S.S.W.* court arrived, for the purpose of analogizing the *Cunard* case, that the Civil Aeronautics Act gives to the CAB "far broader powers than the Congress saw fit to rest in the Shipping Board."⁴⁴ Yet, even if the court were correct on this point, Congressional intent on reasons for not expressly affording such additional relief can be argued on either side. The inclusion of certain remedies automatically presupposes an intent to exclude all others and, therefore, no outside modes of relief are available. On the other hand, Sections 411 and 1106 of the Civil Aeronautics Act (the second and third points of distinction, *infra*), when read in light of broader purposes of more liberal statutory construction, would lead to a contrary conclusion.

No provision similar to Section 411 is to be found in either of the other two acts. It might be argued that a provision which allows the Board to issue orders to cease and desist from unfair methods of competition, giving it a great deal more regulatory control than either the ICC or the Shipping Board, is tantamount to saying that such expanded method of relief is exclusive. However, it is significant that Section 414 relieves from the operation of the Sherman Act persons affected by orders under 408, 409, and 412, but makes no reference to 411. The regulatory sections covered by 414 all require approval by the Board. On the other hand, under 411, the Board may disapprove of what it considers to be unfair trade practices irrespective of what it may have approved. Although no merger, consolidation, interlocking relationship or pooling agreement is subject to anti-trust laws, it does not follow necessarily that a conspiracy to restrain trade, certainly an unfair trade practice which the Board is authorized to enjoin, would be entitled to the same exemption as that which has been affirmatively approved by the Board. Thus by not including 411 within the scope of the exemptions stated in 414, it could be argued that Congress has left that much of the field not providing for affirmative approval by the Board free for consideration by the courts. Although not raised in the *S.S.W.* case, if the plaintiff had argued that Section 411, not protected by Section 414, was thus subjected to the anti-trust laws, this standing alone would not have created a cause of action for damages where the Section itself, even if relieved from necessity of initial or exclusive resort to the Board, provided for a cease and desist order only. Necessary as a second step would be a reading of Section 411 as overlapping into the Sherman Act. In *Federal Trade Commission v. Cement Institute*,⁴⁵ where the allegation was a violation of Section 5(a) of the Federal Trade Commission Act,⁴⁶ the Supreme Court held that a proceeding be-

⁴⁰ See note 37, *supra*.

⁴¹ 24 Stat. 380 (1887), 49 U.S.C. §5 (1946).

⁴² §8, Interstate Commerce Act; 24 Stat. 382 (1887), 49 U.S.C. §68 (1946), and §22 of the Shipping Act, 39 Stat. 736 (1916), 46 U.S.C. §821 (1946) provide that the Commission and the Board can direct payment of full reparation to the complainant for injury caused by violations of the Act.

⁴³ In an action before the CAB, for damages for disruption of petitioner's schedule, the Board stated that it is without authority to award damages, but the remedy rests entirely within the province of the courts. *Page Airlines, Inc.*, 6 CAB 1061, 1066 (1946). See also *Hawaiian Airlines v. Trans-Pacific Airlines*, 78 F. Supp. 1, 6 (D. Hawaii 1948).

⁴⁴ *S.S.W. v. Air Transport Association of America*, 91 F. Supp. 269, 271 (D. C. D. C. 1950).

⁴⁵ 333 U.S. 683 (1948).

⁴⁶ 38 Stat. 717 (1914), 15 U.S.C. §44 (1946).

fore the FTC was not barred by a suit by the government in the federal courts for a violation of the Sherman Act. If the conduct alleged is a combination or conspiracy in restraint of trade, it will violate both the Sherman Act and the Federal Trade Commission Act; thus, proceedings under both Acts were held to overlap. Inasmuch as the language of Section 411 is virtually identical to that of Section 5(a) of the Federal Trade Commission Act, it could be argued that the Civil Aeronautics Act should not preclude the bringing of an anti-trust suit, at least when Section 414 is not applicable, any more than do the provisions of the Federal Trade Commission Act.⁴⁷

The third factor as a possible distinction between the *Cunard* result and a plaintiff's argument outside the Civil Aeronautics Act rests in the rarely invoked Section 1106.⁴⁸ Although a similar section is found in the Interstate Commerce Act (Section 22),⁴⁹ no such provision is found in the Shipping Act. The court mentioned this fact in the *Cunard* case, and indicated that the absence of a "remedies not exclusive" provision in the Shipping Act made a stronger case for applying the "exclusive primary jurisdiction" doctrine in Shipping Board cases than in ICC cases. However, the application of the primary jurisdiction doctrine in the face of this provision in the Interstate Commerce Act does not seem to be controlling upon the *S.S.W.* case for two reasons. First, persons affected by any order under the trade regulation sections of the Interstate Commerce Act are exempt from operation of anti-trust laws, whereas persons affected by orders under Section 411 of the Civil Aeronautics Act are not so relieved. Secondly, in the *Abilene* case, the court construes Section 22 of the Interstate Commerce Act as not "continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the Act." The court continued, "In other words, the Act cannot be held to destroy itself."⁵⁰ It could be argued that the anti-trust remedy sought by complainants in the *S.S.W.* case is a statutory remedy and does not appear to be "absolutely inconsistent" with or to destroy provisions of the Civil Aeronautics Act, but rather appears to be in addition thereto.

To date, Section 1106 has been held not to abrogate existing remedies outside the Act. In *Smithdeal v. American Airlines*,⁵¹ which was a suit in tort for nuisance caused by low flying planes, the court, using Section 1106, held that nothing in the aviation act, either state or national, requires a citizen to seek first and specified administrative remedies. In *Mack v. Eastern Airlines*,⁵² the holding that Section 1106 did not preserve existing contrac-

⁴⁷ A significant distinction may lie in the fact that the FTC has no power of approval while the CAB has that authorization under both §§408 and 412. However, the fallacy in the *S.S.W.* court's approach is its reliance on an argument that actions under those sections fall within the exemptions under §414. The plaintiff's contention could have rested on §411, as not excluded under §414. A further distinction between the FTC Act and the CAA Act lies in the fact that the CAB, unlike the FTC, can reach only present and future acts, while the allegations in the *S.S.W.* case are directed at past violations.

⁴⁸ 52 Stat. 1027 (1938), 49 U.S.C. §676 (1946). "Remedies not exclusive: Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

⁴⁹ 24 Stat. 387 (1887), 49 U.S.C. §22 (1946).

⁵⁰ *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

⁵¹ 80 F. Supp. 233 (N. D. Texas 1948).

⁵² 87 F. Supp. 113 (D. C. Mass. 1949). This was an action for damages by a passenger bound from Washington to Boston; defendant did not transport him beyond New York. Pursuant to §403 of the Civil Aeronautics Act, defendant had published Rules Tariffs, which, among other things, provided that the carrier should not be liable for failure to operate a flight according to schedule.)

tual obligations⁵³ emphasized that only remedies existing by some other statute are preserved by the Section. It may be argued that this language, as applied to tort and contract cases may be too broad to be conclusive upon anti-trust cases, inasmuch as the Civil Aeronautics Act does not concern itself expressly with simple tort or contract cause of action, but does purport to invade the public law of trade regulation. However, such treatment of remedies outside, yet not inconsistent with the Act, is an indication that the language of Section 1106 is not merely illusory. It would seem to afford considerable basis for concluding that notwithstanding any provision of the Civil Aeronautics Act, which does not purport to create exclusive, as distinguished from merely primary jurisdiction,⁵⁴ there is still a remedy available.

The holdings under Section 1106 would indicate a tendency on the part of the courts to consider the outside remedy appropriate if it is one emanating from the common law, as distinguished from statutory, even though reference to both is made in the Section. If true, however, recourse may be had more readily for actions for damages under common law restraints of trade in the state courts, to the extent that charges are of an intra-state nature. There again, the defense of primary jurisdiction in the state commissions would be raised, but the success of such a contention would rest upon the extent to which the states have legislated on the subject of such economic controls and how inclusive are the powers of the commissions. Assuming, however, the limited scope of intra-, as compared with inter-state activities in air commerce, the desirability of treble damages over those compensatory, and the absurdity of such a distinction between statutory and common law damages, a resort to the Sherman, Federal Trade Commission, or Clayton Acts would seem advisable. Of the three, only the Sherman Act is devoid of any reference to indicia of relief other than those available in the courts. If exemption from the operation of one Act implies jurisdiction under another, the organic statute of the agency, both the Federal Trade Commission and Clayton Acts,⁵⁵ containing references over, would preclude action outside the Board. For this reason, the *S.S.W.* court had firmer grounds upon which to reject plaintiff's claim under the Clayton Act.

How far the courts would stretch to create a remedy of treble damages, whether on the "fireside equity" of comparing aeronautics with other regulated industries, on the theory of overlapping created by the *Cement* case, or on a reading of Sections 411 and 412 with 1106, is as yet undetermined.⁵⁶

⁵³ Cf. *Schwartzman v. United Airlines*, note 27, *supra*. The Mack case expressly overruled the Schwartzman case insofar as the latter had held that contractual obligations existing prior to the Civil Aeronautics Act were preserved.

⁵⁴ See note 15, *supra*.

⁵⁵ §7 of FTC Act, 38 Stat. 717 (1914), 15 U.S.C. §45 (1946). §7 and §11 of Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §19 (Supp. 1950).

⁵⁶ The problem is further confused by the recent holding in *United States v. Far East Conference, et al.*, 94 F. Supp. 901 (D. C. N. J. 1951). In a Sherman Act proceeding brought by the government, charging the association and individual defendant water carriers with a conspiracy comparable to that alleged in the *S.S.W.* and *Slick* cases (note 9, *supra*), the district court rejected the primary jurisdiction argument. In attempting to distinguish away the *Cunard* case, the court indicated that, unlike the government, the private litigant had "an enforceable right and an adequate remedy under the Shipping Act." 94 F. Supp. 901, 904. If the distinction rested only upon the fact that the private litigant may secure treble damages under the Sherman Act, there was no need to discuss the *Cunard* case, for no such prayer for relief was made there.

Assuming that a distinction can be made, the *Slick* case, arising in the same Circuit as the *Far East Conference* case, may follow either view on the issue of the *S.S.W.* case. On the other hand, submitting that no such distinction is tenable, the *Slick* court will be forced to face a direct conflict between the *Far East Conference* and the *S.S.W.* holdings.

The argument of primary jurisdiction, if it prevails, may well serve as a device by which to cloud the basic issue of monopoly versus competition in a regulated industry. Neither the CAB, whose holdings are not consistent,⁵⁷ nor the congressional intent⁵⁸ afford an effective rationale. The fact that every certificate issued in effect creates a monopoly serves only to contradict the express language of the Act purporting to enforce some degree of competition.⁵⁹ If the Civil Aeronautics Act continues to leave open to litigation problems of jurisdictional questions, the conflict, if oppressive on the courts can be reconciled only by further interpretation from the Congress.

⁵⁷ Competition in air transport is not mandatory. When considered in relation to any particular route or service, it is within the discretion of the CAB to determine whether competition is necessary in the sound development of the air transport system. Application of Colonial Airlines, 4 CAB 555 (1944); Application of American Airlines, 2 CAB 16 (1940). The Board has held that it could approve consolidations tending to restrain competition if in the public interest. Application of Braniff Airways, 2 CAB 739 (1941); Application of Pan-American Airways, 1 CAB 215 (1940). The Board has also held that it could not approve a consolidation which will prevent competition. Application of Wien Alaska Airlines, 3 CAB 207 (1941).

⁵⁸ See note 2, *supra*. Language is to the effect that the congressional intent was to safeguard against the evils of unrestrained competition and the consequences of monopolistic control.

⁵⁹ §408(b), 1st Proviso: "Provided that Board shall not approve any consolidation, merger, or acquisition of control which would result in creating a monopoly and thereby restrain competition." 52 Stat. 1001 (1938), 49 U.S.C. §448(b) (Supp. 1951).